

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
LIKE A PRAYER TRUST	:	DECISION
		DTA NO. 823506
for Redetermination of a Deficiency or for Refund of New	:	
York State Personal Income Tax under Article 22 of the		
Tax Law for the Year 2004.	:	

Petitioner, Like A Prayer Trust, filed an exception to the order of the Administrative Law Judge issued on July 1, 2010. Petitioners appeared by Kostelanetz & Fink, LLP (Megan L. Brackney, Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel).

Petitioners filed a brief in support. The Division of Taxation did not file a brief in opposition. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner filed a petition dated February 18, 2010, which was received by the Division of Tax Appeals on February 22, 2010. The petition asserts certain errors on the part of the Division

of Taxation (Division) specifically related to the merits of the taxation of the trust and the Notice of Deficiency issued to petitioner dated September 29, 2008, assessing tax due in the amount of \$4,263,951.00 plus penalty and interest, for a total of \$6,964,892.03.

In reviewing the petition, the Petition Intake Unit of the Division of Tax Appeals determined that the petition appeared to have been filed late and notified petitioner of its finding by a Notice of Intent to Dismiss dated March 5, 2010. The notice advised petitioner that the petition was filed on February 19, 2010, its date of mailing, which appeared to be more than 500 days after the issuance of the Notice of Deficiency dated September 29, 2008.

The Division included in its response, dated March 29, 2010, in support of the proposed dismissal, a copy of the petition filed with the Division of Tax Appeals bearing a Fed Ex shipping date of February 19, 2010 and proof of mailing of the Notice of Deficiency on September 29, 2008. The Division's proof of mailing consisted of (i) an affidavit James Steven VanDerZee, the principal mail and supply supervisor of the staff of the Division's mail processing center; (ii) an affidavit of Patricia Finn Sears, the Supervisor of the Refunds, Deposits, Overpayments and Control Units; (iii) an affidavit of Estelle Diamond, a keyboard specialist in the Division's Clerical Support Unit; (iv) a one-page Certified Mail Record (CMR); (v) a copy of the Notice of Deficiency dated September 29, 2008 for Assessment L-030697989-8 issued to petitioner; and (v) a copy of petitioner's fiduciary income tax return, Form IT-205, for tax year 2005, signed and dated October 12, 2006.

The affidavit of Ms. Sears sets forth the Division's general practice and procedure for processing statutory notices prior to their shipment to the Division's mail processing center. Based upon her review of the affidavit of Estelle Diamond, another Division employee (whose affidavit is described herein), the CMR and the Notice of Deficiency, Ms. Sears concluded that in

some cases notices are pulled for manual review, and in this case the notice issued to petitioner was pulled and sent to the Division for review and preparation of the CMR. Subsequently, the CMR was returned to the Clerical Support Unit of the Division with a postmark affixed, showing the date of mailing, the number of pieces received at the Post Office and the Postal Service representative's initials or signature.

The affidavit of James Steven VanDerZee, the mail and supply supervisor, describes the operations and procedures followed by the mail processing center, as follows. After the statutory notices are placed in an "Outgoing Certified Mail" basket, a member of Mr. VanDerZee's staff weighs, seals and places postage on each envelope. The envelopes are counted and the names and certified mail numbers are verified against the information contained on the certified mail record. A member of the mail processing center then delivers the envelopes and the certified mail record to a branch of the United States Postal Service (USPS) in Albany, New York. A postal employee affixes a postmark and also may place his or her initials or signature on the certified mail record indicating receipt by the post office. Here, the postal employee affixed a postmark to the certified mail record, initialed the CMR, and wrote in the total number of pieces of certified mail received. This CMR indicates that a total of two pieces of mail were delivered to the USPS. Based upon Mr. VanDerZee's review of the affidavits of Ms. Sears and Ms. Diamond, the CMR and the Notice of Deficiency, he concluded that one piece of certified mail addressed to Like A Prayer Trust at the same address listed on the Notice of Deficiency was delivered to the USPS in Albany, New York, on September 29, 2008.

The affidavit of Estelle Diamond, a keyboard specialist in the Division's Clerical Support Unit, explained how certain notices were pulled for manual review, generally to verify a taxpayer's mailing address, and that a clerk in that unit would thereafter manually prepare the

CMR for that notice. In addition, the clerk would assign a certified control number to the Notice of Deficiency listed on the CMR. Each page of the CMR would contain a space to record the total number of pieces listed by the sender, the total number of pieces received at the post office, and the name of the receiving postal employee.

According to Ms. Diamond, in this case, the CMR for the Notice of Deficiency mailed to petitioner consisted of one page and the first listing on the page was the one that corresponded to the notice in issue. The second listing on the CMR was redacted. Certified No. 7104 1002 9730 0859 6976 was used for the notice mailed to petitioner, the mailing address was the same as that which appeared on the notice and the CMR bore the same Assessment ID number as the notice in the column marked “remarks” on the CMR. Ms. Diamond concluded that the procedures followed in this case were the normal and regular procedures of the Division for such mailings.

Attached to the petition filed in this matter with the Division of Tax Appeals on February 19, 2010, was correspondence from the Division’s Income/Franchise Field Audit Bureau, Nassau District Office, dated September 11, 2008, along with the Statement of Audit Changes. The correspondence stated:

An audit of the New York State tax returns for the tax period and articles noted above [22, 30 and 30A] has resulted in an increase to the tax liability in the amount of \$6,948,227.00. The enclosed schedules reflect the details of the proposed audit adjustments.

* * *

If you disagree with the findings and would like the opportunity to discuss them in greater detail, please contact the auditor by 09/17/2008. At this time, you may submit evidence to substantiate your position. If penalties have been imposed, you may request waiver of those which you believe and are able to establish that reasonable cause exists for abatement.

Not responding to this letter will result in the issuance of a statutory notice of deficiency. This deficiency will become a statutory assessment unless a request for a conciliation conference or a petition for a Tax Appeals hearing is filed within 90 days.

The Statement of Audit Changes indicated that the assessment was based upon tax on fiduciary income, plus penalties and interest, which resulted from a capital gain of \$55,375,982.00. The statement also bore the following information:

The trust failed to respond to the audit letters. The trust has failed also to show that it qualified as a split interest trust. Hence, it is treated as a taxable entity and the capital gain it reported for 2004 is is [*sic*] taxable to New York.

In response to the Notice of Intent to Dismiss Petition, petitioner submitted correspondence setting forth petitioner's position as follows:

After issuance of the notice of deficiency, the Department reopened the audit and suspended all collection activity. The Trust responded to the Department's audit letters and produced numerous documents. On December 2, 2009, the auditor issued a second notice advising the Trust that the 'assessment...is sustained,' and providing [*sic*] the following new explanation for the assessment: '[T]he Trust failed to make distribution as required by the trust deed, and to name a qualified charity. Proper books and records were not submitted to verify the utilization of funds.'

* * *

The Trust timely filed the Petition challenging the Department's December 2, 2009 notice well within the ninety-day period provided by New York Tax Law § 2006[4].

The December 2, 2009 letter from the Division's Income/Franchise Field Audit Bureau, Nassau District Office, from which petitioner measured the commencement of the 90-day period in which to file its petition, stated the following, in pertinent part:

Based on the information submitted, we have concluded that Trust failed to comply with the Trust deed and rules relating to charitable remainder [*sic*] trusts. Specifically, the Trust failed to make distributions as required by the trust deed, and to name a qualified charity. Proper books and records were not submitted to verify the utilization of funds. The Trust is deemed to be a taxable entity. As a result, the assessment #L-03069789-8 issued for the year 2004 is sustained.

THE ORDER OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge determined that petitioner failed to file a timely protest of the Notice of Deficiency. The Administrative Law Judge held that the submitted affidavits and the CMR were sufficient to establish that the Notice of Deficiency was sent on September 29, 2008, triggering the statutory 90-day period. Petitioner did not file its protest until February 19, 2010, which was well in excess of 365 days after the expiration of the 90-day period.

The Administrative Law Judge held that the December 2, 2009 letter from the Division neither constituted a statutory document under Tax Law § 2008(1) nor tolled the 90-day period to protest the claim. The Administrative Law Judge noted that the September 29, 2008 notice provided clear and unambiguous language alerting petitioner of the 90-day period to file a protest. The Administrative Law Judge also noted the absence of evidence that would warrant equitable relief. Therefore, the Administrative Law Judge rejected petitioner's arguments and determined that the Division of Tax Appeals lacked subject matter jurisdiction over the matter and dismissed the petition.

ARGUMENTS ON EXCEPTION

On exception, petitioner raised the same arguments as it did below, claiming that the 90-day period should be calculated from the December 2, 2009 letter or, in the alternative, that said letter tolled the time to protest of the original Notice of Deficiency.

The Division argued that the Administrative Law Judge correctly decided the issues below and, therefore, the order should be affirmed.

OPINION

We affirm the order of the Administrative Law Judge.

The Division moved for summary judgment based on a lack of jurisdiction resulting from an alleged late-filed petition. To carry its burden, the Division was required to evidence the standard procedure used to issue such notices and that this procedure was used in this particular instance (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). The Administrative Law Judge reviewed the submitted CMR and the detailed affidavits of Division employees evidencing proper mailing of the Notice of Deficiency to petitioner's last known address on September 29, 2008. The Administrative Law Judge properly determined that September 29, 2008 was the date that triggered the 90-day period to protest the notice.

To prevail, petitioner was required to come forth with facts and documentation to defeat this motion (*see Zuckerman v. City of New York*, 49 NY2d 557 [1980]). Petitioner provided no evidence to controvert the foregoing. Instead, petitioner argued that a letter issued after the expiration of the 90-day period constitutes a statutory document under Tax Law § 2008(1) or tolls the 90-day period. Tax Law § 2008(1) provides:

All proceedings in the division of tax appeals shall be commenced by the filing of a petition with the division of tax appeals protesting any written notice of the division of taxation which has advised the petitioner of a tax deficiency, a determination of tax due, a denial of a refund or credit application, a cancellation, revocation or suspension of a license, permit or registration, a denial of an application for a license, permit or registration or any other notice which gives a person the right to a hearing in the division of tax appeals under this chapter or other law.

The Administrative Law Judge properly considered these arguments and we adopt the reasoning of the order below. We note that the correspondence dated December 2, 2009 did not revive, renew, or reopen the statutory 90-day period, which had closed almost an entire year

earlier. Similarly, this correspondence could not toll the protest period because it had already expired and the assessment had become final. Accordingly, the Administrative Law Judge properly determined that the December 2, 2009 letter was not a statutory document and that, as such, the Division of Tax Appeals lacked subject matter jurisdiction to consider the merits of the petition.

Accordingly, its is ORDERED, ADJUDGED and DECREED that:

1. The exception of Like A Prayer Trust is denied;
2. The order of the Administrative Law Judge is affirmed; and
3. The petition of Like A Prayer Trust is dismissed.

DATED:Troy, New York
March 3, 2011

/s/ James H. Tully, Jr.
James H. Tully, Jr.
President

/s/ Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner